COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS | **BOARD NO. 009574-90**

James F. Keegan	Employee
August A. Busch & Company	Employer
Pacific Employers Insurance Company	Insurer
Burke and Burke	Claimant
Carney and Troupe[1]	Respondent/Lienholder

REVIEWING BOARD DECISION

(Judges Costigan, Levine and Maze-Rothstein)

APPEARANCES

Joseph M. Burke, Esq., for Burke and Burke
Gerald B. Carney, Esq., for Carney and Troupe at hearing and on brief
William H. Troupe, Esq., for Carney and Troupe on brief

COSTIGAN, J. The claimant law firm, Burke and Burke, appeals from a decision in which an administrative judge determined that the $9,000 attorney's fee, payable out of the employee's § 48 lump sum settlement with the insurer, was subject to the lien filed by the law firm of Hislop, Carney and Troupe, pursuant to G. L. c. 221, § 50.[2] The judge found that a March 1993 separation agreement between Attorney

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1 As successor in interest to the firm of Hislop, Carney and Troupe, where Attorney Joseph M. Burke practiced until March 1993. Attorney John D. Hislop, III, assigned his rights under the separation agreement to Carney and Troupe when he left that firm in 1998. (Dec. 733, 738.)

2 General Laws c. 221, § 50, as amended by St. 1945, c. 397, § 1, provides:

> From the authorized commencement of an action, counterclaim or other proceeding in any court, or appearance in any proceeding before any state or federal department, board or commission, the attorney who appears for a client in such proceeding shall have a lien for his reasonable fees and expenses upon his client's cause of action, counterclaim or claim, upon the judgment, decree or other order in his client's favor entered or made in such proceeding, and upon the proceeds derived therefrom. Upon request of the client or of the attorney, the court in which the proceeding is pending or, if the proceeding is not pending in a court, the superior court, may determine and enforce the lien; provided, that the provisions of this sentence shall not apply to any case where the method of the determination of attorney's fees is otherwise expressly provided by statute.

Joseph M. Burke[3] and that law firm, (Ex. 4), applied to and controlled their respective fee entitlements. He awarded $3,000, one-third of the fee, to Carney and Troupe, the appellee in this matter. Because we agree with Burke and Burke that the separation agreement did not apply to the lump sum attorney's fee at issue -- a point which Carney and Troupe barely disputes on appeal -- we reverse the decision and recommit the case to the judge to determine what share of the fee, if any, is due to Carney and Troupe, based solely on the equitable doctrine of quantum meruit.

The facts of the underlying claim are, for the most part, irrelevant to the attorney's fee issue before us. Until July 1994, the employee was represented by Hislop, Carney and Troupe in his claim for workers' compensation benefits stemming from a March 6, 1990 shoulder injury. While Attorney Burke was working at the firm, as a member but not as a principal, (Dec. 735), he handled the employee's claim at all times, but for one conciliation in 1991 at which Attorney Hislop appeared for the employee. (Dec. 735-736.) The employee was placed on § 35 partial incapacity benefits [by agreement] in 1991. (Dec. 736.)

When Attorney Burke left the employ of Hislop, Carney and Troupe on March 5, 1993[4], the parties executed a separation agreement which provided, in pertinent part:

> All files that Mr. Burke is handling at HISLOP, CARNEY AND TROUPE, which have not been concluded prior to March 12, 1993, will be taken by Mr. Burke and Mr. Burke will forward a one-third (1/3) fee to HISLOP, CARNEY AND TROUPE. . . . This applies to all files that Mr. Burke takes from HISLOP, CARNEY AND TROUPE including the workers' compensation and tort cases.

(Dec. 736-737; Ex. 4.) The separation agreement included a list of those active cases that Attorney Burke was to take with him when he left the firm. As the parties stipulated at hearing, (Dec. 733), Mr. Keegan's case was not on that list, even though the employee was still receiving weekly incapacity benefits at the time. (Dec. 736-737.) The judge

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3 Since March 1993, a principal and partner of Burke and Burke.

4 The original agreement, dated March 1, 1993, referenced a termination date of March 12, 1993. On March 5, 1993, the parties signed an addendum agreement changing the termination date to March 5, 1993. (Ex. 4.)

found that "[a]s the case had not been closed and was not listed in the separation agreement, it was a case that belonged to Hislop, Carney and Troupe after Attorney Burke's separation." (Dec. 737.)

In July 1994, the Keegan file was transferred from Hislop, Carney and Troupe to Burke and Burke.[5] The firm forwarded the employee's file, along with a notice of lien for attorney's fees, pursuant to G. L. c. 221, § 50. (Dec. 738; Ex. 12.)[6] Between 1999 and 2001, Attorney Burke filed several claims on behalf of the employee which were ultimately resolved when Attorney Burke negotiated a $45,000 lump sum settlement agreement with the insurer. The settlement was approved by the administrative judge on July 18, 2001, but the twenty per cent statutory attorney's fee of $9,000, G. L. c. 152, § 13A(8)(b), was placed in escrow pending resolution of the dispute between the two law firms. (Dec. 738.)

At hearing before the administrative judge, Burke and Burke first contended that the judge lacked jurisdiction to enforce the lien for attorney's fees because the approved lump sum settlement agreement provided for payment of the $9,000 fee only to Burke and Burke, which, it argued, "precludes further inquiry into the merits of the original controversy except by the Superior Court for fraud or mistake." Maxwell v. North Berkshire Mental Health, 16 Mass. Workers' Comp. Rep. 108, 112-113 (2002). The judge disagreed, drawing the apt distinction that no lien for attorney's fees had yet been asserted when the lump sum settlement in Maxwell was approved. (Dec. 739.) The judge also noted that G. L. c. 221, § 50, expressly authorizes any court or "any state . . . department, board or commission" in which a proceeding is pending to determine and enforce the lien. (Dec. 740.) Arguably, the 2001 "proceeding" on the employee's claims

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[5] Although the judge found that Attorney Burke requested the file be sent to him, (Dec. 738), both parties agree that it was the employee who sent a letter to Hislop, Carney and Troupe requesting that his file be sent to Burke and Burke. (Burke brief, 1-2; Carney and Troupe brief, 3.)

[6] We note that the date of injury listed on the July 11, 1994 notice of lien letter, (Ex. 12), is December 31, 1991, not March 6, 1990. The claimant, however, did not challenge the validity of the lien on that basis either at hearing or on appeal.

ceased to be pending when the lump sum settlement agreement was executed by the employee and the insurer and approved by the judge on July 18, 2001, (Dec. 738; Ex. 3), since that approved agreement was analogous to a final judgment in the case. However, an attorney's lien, pursuant to G.L. c. 221, § 50, "mature[s] upon entry of judgment," PGR Mgmt. Co. v. Credle, 427 Mass. 636, 640 (1998), and the Supreme Judicial Court has allowed that the owning tribunal is an appropriate venue for such determination and enforcement of the lien. See id. at 640-641(Housing Court determined and enforced lien on tenant's counterclaim after judgment entered in proceeding). Alternatively, the Appeals Court has construed workers' compensation proceedings to extend beyond the execution and approval of lump sum agreements. See Eastern Casualty Ins. Co. v. Roberts, 52 Mass. App. Ct. 619, 627 (2001)("[T]he point in the proceeding to which the statutory penalty provision relates was the time at which Eastern was required to make payment under the [lump sum] agreement"). We consider it reasonable that an administrative judge be able to determine and enforce an attorney's lien on lump sum settlement proceeds, as being an issue within the scope of "any other issue arising under this chapter," G. L. c. 152, § 10(1), particularly when, as here, the employee and the insurer agreed he should do so. (Dec. 739.)

In determining whether its lien entitled Carney and Troupe to any share of the lump sum attorney's fee, the judge found that the March 1993 separation agreement controlled, even though the Keegan case was not listed in that document. He wrote:

> While this provision likely was written to cover all of the cases taken by Attorney Burke at the time of his severance, there is no provision which expressly limits the agreement to those cases. There can be no dispute as to the plain meaning of the word "all" in the above quoted passage. [Provision "applies to all files that Mr. Burke takes from HISLOP, CARNEY AND TROUPE. . . ."] The lien which Hislop, Carney and Troupe attached to the file at the time that it was turned over to Attorney Burke served as notice that they were asserting their rights under the separation agreement.

(Dec. 740.) The judge therefore awarded Carney and Troupe $3,000 of the $9,000 lump sum attorney's fee. (Dec. 741.) We agree with Burke and Burke that the judge's decision cannot stand.

We think the judge erred in his construction of the separation agreement. The fee-sharing and file-taking provisions speak for themselves:

> 3. All files that Mr. Burke *is handling* at HISLOP, CARNEY AND TROUPE which have not been concluded prior to March 12, 1993, [see n.4, supra] will be taken by Mr. Burke and Mr. Burke will forward a one-third (1/3) fee to HISLOP, CARNEY AND TROUPE. After payment of referral fees to other attorneys and WYNN & WYNN and after reimbursement of expenses, Mr. Burke will forward to HISLOP, CARNEY AND TROUPE one-third of the fee and Mr. Burke will retain two-thirds (2/3) of the fee. This applies to all files that Mr. Burke *takes* from HISLOP, CARNEY AND TROUPE including workers' compensation and tort cases.
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> . . .
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> 12. There will be no contact by HISLOP, CARNEY AND TROUPE on any of the files that Mr. Burke *will be removing* from HISLOP, CARNEY AND TROUPE.
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> 13. There will be no contact by Joseph M. Burke on any files or clients *remaining* at HISLOP, CARNEY AND TROUPE.

(Ex. 4, emphasis added.) The present tense used in the highlighted phrases convinces us that the parties were addressing the status of cases at the time of the separation, and not into the future. Attorney Burke did not "take" or "remove" the Keegan file. Sixteen months after the separation, the employee asked that his file be transferred to Burke and Burke. See n.5, supra. Moreover, the administrative judge found that "[i]ncluded in the separation agreement was a list of *active* cases that Attorney Burke was taking with him as he left. Keegan's case was not one of the cases listed." (Dec. 736.) He also found that "[a]t the time of the separation the Keegan case had been inactive for more than a year." (Dec. 737.) These findings do not support the judge's conclusion that the parties intended the Keegan case to fall within the fee-sharing provision of the separation agreement, and his reliance on the agreement to determine the value of the attorney's lien was erroneous.

The administrative judge should have approached Carney and Troupe's lien for attorney's fees as a matter of quantum meruit[7], i.e., the reasonable value of the legal services rendered by the firm. See Elba v. Sullivan, 344 Mass. 662, 665-666 (1962)(determination of lien based on equitable accounting of fair value of services rendered by lienholder, with view toward case in its entirety). Accordingly, we recommit the case for the judge to apply the implied contractual doctrine of quantum meruit -- see Park Drive Towing, Inc. v. Revere, 60 Mass. App. Ct. 173, 177 n.5 (2003) -- to determine the value of the attorney's fee lien under G. L. c. 221, § 50.

So ordered.

Patricia A. Costigan
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Susan Maze-Rothstein
Administrative Law Judge

Filed: **March 4, 2004**

[7] Indeed, the transcript of the § 11 hearing on the fee dispute bears the heading, "Quantum Meruit Hearing at Boston, Massachusetts on Friday, November 1, 2002," (Tr. 1), and the judge summarized the dispute thusly:

> The issue before me is the division of the fee. The fee is $9,000. Mr. Burke claims 100 percent of the fee saying that he owes nothing to the firm of Carney & Troupe. Carney & Troupe claim that they are entitled to one third of the fee. Both parties here claim that **Quantum Meruit** is on their side.

(Tr. 6.) (Emphasis in original.)